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SEP 29 2005

OFFICE OF PETITIONS

In re Application of
Marc S. Somers
Application No. 08/435,072
Filed: May 5, 1995
Attorney Docket No. 70213

ON PETITION

~~In re Application of
Marc S. Somers
Application No. 10/536,079
Filed: September 23, 1997
Attorney Docket No. N/A~~

This decision addresses the petition under 37 CFR 1.181, filed October 22, 2003 in application no. 08/435,072. Petitioner requests that the Office acknowledge that a FWC of then copending application no. 08/435,072 was submitted on September 22, 1997 by issuing a filing receipt for the FWC application, that all papers pertaining to the FWC be placed in the appropriate file, and that the preliminary amendment submitted on September 22, 1997 be entered into the new FWC application.

Petitioner states that a FWC of application no. 08/435,072 was submitted on September 22, 1997. Petitioner states that the filing contained a power of attorney, a preliminary amendment, payment of \$770.00 by deposit account, and an express abandonment of the parent application. These papers cannot be found in application no. 08/435,072 and a review of Office databases does not reveal that a 1.53(b) application file was created by mistake for the application papers. In short, the original copy of the papers cannot be located in the Office.

Petitioner filed a second preliminary amendment on certificate of mailing date June 28, 2000. This filing listed an incorrect application no., 09/019,746, but several other identifiers that corresponded to application no. 08/435,072, and any FWC if it had been created, were present. A date stamped postcard receipt proves the second preliminary amendment was received in the Office on July 6, 2000.

A non-final Office action was mailed on February 11, 2003 in application no. 08/435,072 that explicitly states it was created in response to a FWC. The content of the February 11, 2003 Office action does not point to the conclusion that the preliminary amendment submitted on September 22, 1997 or the second preliminary submitted on June 28, 2000 was considered.

Petitioner responded to this Office action on May 19, 2003. While the application no. listed on the May 19, 2003 amendment (09/019,746) was again incorrect, several other identifiers that would have corresponded to application no. 08/435,072, and any FWC if it had been created, were present. It should have been relatively simple to place the reply to the Office action in the appropriate file. It appears that this response was not matched up with the '072 file until after November 2004, when the Office deemed the application abandoned for failure to respond to the February 11, 2003 office action. After November 2004, the May 19, 2003 response was placed in application no. 08/435,072.

Petitioner filed the instant petition on October 22, 2003 (certificate of mailing date October 20, 2003).

As stated above, the original September 22, 1997 FWC request and the papers filed along with it cannot be located in the Office. However, petitioner has provided a date stamped itemized postcard receipt that proves a FWC, a power of attorney, a preliminary amendment, payment of \$770.00 by deposit account, and an express abandonment of the parent application were received by the Office on mail room date September 23, 1997.

FWC practice was still in effect on September 23, 1997. Petitioner complied with Section 1.62. The papers received in the Office on September 23, 1997 should have been processed as a FWC. **The 37 CFR 1.62 application has been assigned application No. 10/536,079 with a filing date of September 23, 1997.**

To facilitate further processing, the undersigned has photocopied the original specification, claims, drawing, and oath from application no. 08/413,072 and placed it in application no. 10/536,079. In addition, the undersigned has transferred the first preliminary amendment filed September 23, 1997, the second preliminary amendment filed June 28, 2000, the non-final Office action of February 11, 2003, the reply of May 19, 2003 (certificate of mailing date May 12, 2003), an associate power of attorney filed certificate of mailing date July 1, 1998, and another associate power of attorney filed May 19, 2003 (certificate of mailing date May 12, 2003) to application no. 10/536,079.

Deposit account no. 05-0221 will be charged a \$770.00 basic filing fee, as authorized by the FWC transmittal letter, filed September 23, 1997. This money will be placed in the financial records for application no. 10/536,079.

Thereafter, the application nos. 10/536,079 and 08/324,072 will be forwarded to the Initial Patent Examination Division. Application no. 10/536,079 will be processed (1) as a continuation application under 37 CFR 1.62 based on prior application No. 08/324,072, (2) with a filing date of September 23, 1997.

Telephone inquiries may be directed to the undersigned at (571) 272-3230.



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